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IN THE

SUPREME COURT OF THE UNITED STATES.

Term, 1951. No.

JOSEPH A. KELLY,
Petitioner,

VS.

THE DELAWARE RIVER JOINT COMMISSION, a Corporation, PHILADELPHIA TRANSPORTATION COMPANY, a Corporation, J. I. HASS CO., INC.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

TO THE HONORABLE FRED M. VINSON, CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner above named respectfully represents:

Summary and Short Statement.

1. The petitioner-plaintiff was seriously injured on September 3, 1947, when struck by a passenger train while painting the Delaware River Bridge between Camden, N. J. and Philadelphia, Pa. The bridge is owned by the defendant Delaware River Joint Commission, a corporation created by the States of New Jersey and Pennsylvania, and over the bridge a passenger railway is operated by the defendant Philadelphia Transportation Company undoubtedly under a written contract with the Commission. The immediate employer or hirer of the plaintiff was a painting contractor, the defendant J. I. Hass Co., Inc , and the plaintiff expects to show by the written documents between the various defendants that he was an employee of the operators of the interstate railroad within the meaning of the Federal Employers' Liability Act.

2. On January 21, 1949, plaintiff entered this action in the District Court of the United States for the Eastern District of Pennsylvania, and on July 18, 1949, the Court granted defendants' Motions to Dismiss (*Kelly vs. Delaware River Joint Commission,* 85 F. Supp. 15). Counsel for plaintiff then carefully read Rule 15 (a) of the Rules of Civil Procedure and concluded that no final judgment had been entered, and that plaintiff had a right as of course to file an amended complaint at any time within the Statute of Limitations.

3. Rule 15 (a) has remained unaltered since its promulgation by your Honorable Court, and the pertinent portion reads as follows:

"(a) AMENDMENTS. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served, or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires."

4. On May 16, 1950, plaintiff filed a motion for production of documents, etc.; and meanwhile, having read certain decisions which questioned the literal meaning of Rule 15 (a) of the Rules of Civil Procedure, filed on June 13, 1950, a motion for leave to file an amended complaint (although under Rule 15 (a) it appears that plaintiff had such right as of course).

5. Argument on the two motions having been heard, the District Court denied the motion for leave to file an amended complaint (10 F. R. D. 455) on July 27, 1950, because more than six months had expired from the date of the judgment holding the pleading insufficient.

6. It is conceded that the District Court was in error in its failure to know that the limit of six months under Rule 60 (b) within which the judgment could be amended, had been changed to one year.

7. On appeal from the refusal of the District Court to allow the motion to file an amended complaint, the Circuit Court of Appeals of the Third Circuit in affirming the judgment of the District Court wrote (on January 26, 1951):

"We agree with the Court of Appeals for the First Circuit in the Newbury cases that a motion to dismiss is not a responsive pleading and that, therefore, if the provision of Rule 15 (a), 'at any time before a responsive pleading is served,' be construed literally the plaintiff could amend his motion under Rule 15 (a). We also agree with the First Circuit that a construction of Rule 15 (a) which would permit amendment until the end of time is a most implausible one for there could never be an end to a litigation or to the cloud created by a *lis pendens*. We conclude also that there is some discretionary power in a United States District Court to vacate or set aside a judgment of dismissal within the period of time prescribed by Rule 59 (b) and (e), ten days, or by Rule 60 (b), one year. To hold otherwise would be to put a plaintiff in the position he was in at common law when a demurrer to his narr had been sustained. We think that the framers of the Rules of Civil Procedure did not contemplate such a result."

Jurisdiction.

Your Honorable Court has jurisdiction under the Act of June 25, 1948, Chapter 646, 62 Stat. 928 (28 U. S. C. A. 1254).

The Questions Presented.

I. Do the Rules of Civil Procedure literally mean what they say?

II. Should a party be denied his day in Court because his attorney and the District Court did not know that the Rules

of Civil Procedure had been amended, when his application was timely under the Rules as amended.

Reasons Relied On.

A. For many years prior to the adoption of the Federal Rules of Civil Procedure, the Common Law rule governing the effect of the sustaining of a demurrer was not the law of the United States Courts:

> "A ruling on demurrer settles nothing but the law upon the facts recited in the pleading attacked, and affects only the pleading demurred to. Sustaining a demurrer does not terminate the action, but *merely declares the allegations of the pleading to be insufficient,* * * *."
>
> 49 *Corpus Juris*, Sec. 559.
>
> "In the absence of a statute or rule of court to the contrary, after sustaining a demurrer, it is discretionary with the court to allow or refuse an amendment of the pleading demurred to; * * *. The discretion should be exercised liberally in favor of amendments, it being said to be almost a matter of course to permit them."
>
> 49 *Corpus Juris*, Sec. 563.

citing the following U. S. cases:

Strout v. United Shoe Mach. Co., 224 Fed. 1016 (aff. 225 Fed. 1022, 140 C. C. A. 609);

McKemy v. Supreme Lodge A. O. U. W., 180 Fed. 961, 104 C. C. A. 117;

Florence Oil, etc., Co. v. Interstate Nat. Bank, 76 Fed. 888, 22 C. C. A. 604;

Hodgson v. Alexandria Mar. Ins. Co., 12 F. Cas. No. 6,566, 1 Cranch C. C. 460.

B. The plaintiff modestly asks that the Rules of Civil Procedure be literally construed, and not classified under the cynical maxim *"Qui haeret in littera haeret in cortice."*

> "The Supreme Court of the United States has furthermore held that a liberal rule should be applied in interpreting the provisions of the Federal Rules of Civil Procedure, * * *."

Porter v. Theo. J. Ely Mfg. Co., 5 F. R. D. 317, 321 and Rule 15 (a) specifically states:

> "* * * leave shall be freely given when justice so requires."

C. The supposed *lis pendens* quandary created by the Circuit Court could be speedily solved by defendants' motion for a *non pros.* Litigation need not be open until the end of time—we have statutes of limitation.

Respectfully submitted,

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